

DEPARTMENT OF STATE REVENUE

**LETTER OF FINDINGS NUMBER 04-0465P
TAX ADMINISTRATION (USE TAX)—
NEGLIGENCE PENALTIES FOR THE REPORTING PERIODS
COVERING CALENDAR YEARS 2001-03**

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the *Indiana Register* and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the *Indiana Register*. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Tax Administration—Negligence Penalties—Audit Deficiencies—Alleged *De Minimis* Deficiencies

Authority: IC §§ 6-8.1-1-1, -5-1(b), -10-2.1 and 10-7 (2004); 45 IAC § 15-11-2(b) and (c) (2004)

II. Tax Administration—Negligence Penalties—Audit Deficiencies—Good Filing History

Authority: IC §§ 6-8.1-5-1(b) and -10-2.1 (2004); *State Bd. of Tax Comm'rs v. New Castle Lodge # 147, L.O.O.M.*, 765 N.E.2d 1257, 1264 (Ind. 2002); *Hoogenboom-Nofziger v. State Bd. of Tax Comm'rs*, 715 N.E.2d 1018, 1024 and 1024-25 (Ind. Tax Ct. 1999); 45 IAC § 15-11-2 (2004)

The taxpayer protests the proposed assessment of negligence penalties for its incurring audit deficiencies.

STATEMENT OF FACTS

The Department's Audit Division conducted a field audit of the taxpayer for the tax type and reporting periods set out in the heading of this Letter of Findings. As a result of the audit, the taxpayer incurred tax deficiencies. The Audit Division proposed assessing, and the taxpayer has protested only proposed assessment of, negligence penalties. The Department will provide additional information as needed.

DISCUSSION

A. TAXPAYER'S ARGUMENT

The taxpayer argues that the combined deficiencies for the audit period were nominal. The taxpayer is essentially contending that the Department should waive the negligence penalties because the total dollar value of transactions on which it failed to pay use tax is, in the taxpayer's view, *de minimis*.

B. APPLICABLE PENALTY LAW

IC § 6-8.1-10-2.1 (2004) is the statute that authorizes the Department to impose a penalty for any negligence of a taxpayer in failing to comply with the tax laws that the Department administers. IC § 6-8.1-10-2.1(a)(3) states that "(a) [i]f a person:... (3) [i]ncurs, upon examination by the department, a deficiency that is due to *negligence*; ... the person is subject to a penalty." *Id.* (Emphasis and alterations added.) Title 45 IAC § 15-11-2(b) (2004) defines "negligence" in relevant part as follows:

(b) "Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. *Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence.*

Id. (Emphasis added.) "[L]isted tax laws[.]" *id.* (alterations added), refers to the definition of the term "listed taxes" found in IC § 6-8.1-1-1 (2004). The listed taxes are all of the tax laws for which the General Assembly has explicitly made the Department responsible. They include the gross retail (sales) and use taxes.

"If a person subject to the penalty imposed under this section [IC § 6-8.1-10-2.1] can show that the failure to...pay the deficiency determined by the department was *due to reasonable cause* and not due to willful neglect, the department shall waive the penalty." IC § 6-8.1-10-2.1(d) (emphasis and alteration added.). The implementing regulation restates this requirement as requiring the taxpayer to show that the failure to discharge its tax duties "was due to reasonable cause and not due to negligence." 45 IAC § 15-11-2(c). This subsection of the regulation goes on to state:

In order to establish reasonable cause, the taxpayer must demonstrate that it exercised *ordinary business care and prudence* in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. ...

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Id. (Emphasis added.)

The taxpayer “must make an affirmative showing of all facts alleged as a reasonable cause for [its] failure to ... pay the deficiency[.]” IC § 6-8.1-10-2.1(e) (alterations added). The evidentiary showing the taxpayer must make under IC § 6-8.1-10-2.1(d) and (e) and 45 IAC § 15-11-2(c) is consistent with IC § 6-8.1-5-1(b), which places the burden of proof in all protests on the person against whom a proposed assessment is made to prove that it is wrong. The burden of proof is not on the Department to show negligence, willful or otherwise, by, or the absence of reasonable cause for the actions or inaction of, a taxpayer.

IC § 6-8.1-10-7 imposes the only other limits, monetary ones, on the Department’s authority to assess and enforce a penalty under IC § 6-8.1-10-2.1. That statute provides:

Notwithstanding the various penalty provisions of [IC] chapter [6-8.1-10], the maximum total penalty that may be assessed against a person under sections 2.1 through 5 of this chapter [i.e., IC §§ 6-8.1-10-2.1 to -5, which all use percentage formulas to calculate the respective penalties they impose] is one hundred percent ... of the unpaid tax and *the minimum penalty, if any, that may be assessed under those sections is five dollars (\$ 5).*

Id. (Emphasis and alterations added).

C. ANALYSIS

IC § 6-8.1-10-7 sets the maximum and minimum amounts of percentage-based penalties, including the negligence penalty, the Department may assess; the minimum is five dollars (\$5). However, once the Department has assessed a negligence penalty greater than the minimum, as it did here, IC § 6-8.1-10-2.1(d) and (e) govern the Department’s ability to waive that penalty. There is nothing in either of those subsections that even authorizes the Department to waive a negligence penalty on the ground that the amount of unpaid tax is *de minimis*, much less anything setting out an amount, or a formula to determine an amount, of unpaid tax that the Department could treat as being *de minimis*. Nor does IC § 6-8.1-5-1(a), the subsection requiring the Department to make a proposed assessment of tax it reasonably believes was not properly reported, set any minimum figure of unpaid tax below which the Department is excused from doing so. Had the General Assembly wanted to set a floor amount of unpaid tax below which it would deem the taxpayer not liable for any such tax as a matter of law, it easily could have said so.

The only ground on which IC § 6-8.1-10-2.1(d) requires the Department to waive a negligence penalty, once assessed, is “reasonable cause[.]” *Id.* (Alteration added.) The legislature’s use of this term necessarily implies that the determinative factor for the Department in deciding whether to waive a negligence penalty is the cause of, not the amount of unpaid tax resulting from, the compliance failure in question. The only material reference to a number concerning the negligence penalties IC § 6-8.1-10-2.1(a) imposes is to the amount of unpaid, underpaid, unreported or underreported taxes. The only use for that figure that IC § 6-8.1-10-2.1 mentions is to compute the negligence penalty; subsection (b) uses that amount as the multiplicand to

which the Department applies the ten percent multiplier to determine the amount of the subsection (a) penalty. *See* IC § 6-8.1-10-2.1(b) (setting out the computation formulae). The size of this multiplicand, standing alone, is irrelevant to answering the questions of why and how it came into being, and more precisely to answering the question of whether or not the failure out of which it arose was due to the taxpayer's negligence.

FINDING

The taxpayer's protest is denied to the extent it is based on this issue.

II. Tax Administration—Negligence Penalties—Audit Deficiencies—Good Filing History

DISCUSSION

A. TAXPAYER'S ARGUMENT

The taxpayer submits that the other reason the Department should waive the negligence penalties is that it files its returns faithfully.

B. ANALYSIS

The taxpayer's argument is in effect that it exercised ordinary care and prudence in filing its returns with this Department, thereby implying that it had "reasonable cause," as 45 IAC § 15-11-2(c) defines that term, for its incurring audit deficiencies. That argument does not support the taxpayer's protest because it does not address the basis on which the negligence penalties were proposed against it. The taxpayer was not penalized by the Compliance Division under IC § 6-8.1-10-2.1(a)(1) or (2) for failing to file returns, for failing to file returns on time, or for failing to pay the full amount of tax shown on those returns. It was penalized by the Audit Division under IC § 6-8.1-10-2.1(a)(3) for "[i]ncur[ring], upon examination by the department, a deficiency that is due to negligence[.]" *Id.* (Alterations added.) The fact that the taxpayer filed its returns promptly and paid all the tax it reported has no tendency to prove that the present deficiencies, resulting from its omissions of tax from those returns, were incurred for reasonable cause. The taxpayer has therefore failed to sustain its burden of proof concerning the proposal of the negligence penalties to the extent it has based its protest on this ground.

The taxpayer has failed to submit any evidence showing, or make any argument, that it had reasonable cause for incurring the audit deficiencies. Indiana law is settled that this state's taxation hearing officers, and by extension the state-level taxing authorities of which they are agents, "do not have the duty to make a taxpayer's case." *Hoogenboom-Nofziger v. State Bd. of Tax Comm'rs*, 715 N.E.2d 1018, 1024 (Ind. Tax Ct. 1999), *cited with approval in State Bd. of Tax Comm'rs v. New Castle Lodge # 147, L.O.O.M.*, 765 N.E.2d 1257, 1264 (Ind. 2002). The Tax Court stated the rationale for this rule in *Hoogenboom-Nofziger* as follows:

[T]o allow [a taxpayer] to prevail after it made such a cursory showing at the administrative level would result in a tremendous workload increase for [the Department and] the State Board [now the Indiana Board of Tax Review], ...

administrative agenc[ies] that already bear[] ... difficult burden[s] in administering this State's [listed and] property tax system[s]. If taxpayers could make a de minimis showing and then force [the Department or] the State Board to support its decisions with detailed factual findings, the [Indiana taxing authorities] would be overwhelmed with cases such as this one. This would be patently unfair to other taxpayers who do make detailed presentations to the [taxing authorities] because resolution of their appeals would necessarily be delayed.

715 N.E.2d at 1024-25 (alterations added).

FINDING

The taxpayer's protest is denied.

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